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No. 92-1254

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CHARLES N. REED,
Petitioner,

v.

PHILADELPHIA, BETHLEHEM & NEW ENGLAND RAILROAD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED *

In an action under the Federal Safety Appliance Act ("FSAA"), the Court of Appeals found that the District Court had committed a lengthy series of specific, predominantly evidentiary, trial errors which so severely prejudiced the defendant that a new trial was required.

The only question properly before this Court is:

Did the Court of Appeals err in finding that, under the circumstances of this case, evidence that the coupling mechanisms on the railroad cars functioned properly immediately after the accident was "relevant" to the question whether the coupling mechanisms functioned properly at the time of the accident?

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* The second and third issues raised in the petition, which deal with the misalignment defense and the Seventh Amendment, are not properly before this Court because they were not initially raised in or considered by the Court of Appeals on this appeal.

PARTIES TO THE PROCEEDING

All of the parties to the proceeding are identified in the caption.*

* The following information is provided pursuant to this Court's Rule 29.1: respondent Philadelphia, Bethlehem & New England Railroad Company is a wholly-owned subsidiary of Bethlehem Steel Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
INTRODUCTION AND SUMMARY OF ARGUMENT	5
REASONS FOR DENYING THE WRIT	9
I. THIS IS A UNIQUE, FACT-SPECIFIC CASE THAT DOES NOT WARRANT REVIEW BY THIS COURT	9
II. THERE IS NO NEED FOR REVIEW OF THE COURT OF APPEALS' DETERMINATION THAT EVIDENCE OF THIS POST-ACCIDENT INSPECTION WAS "RELEVANT" IN THIS CASE	9
III. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER THE VALIDITY OF THE MISALIGNMENT DEFENSE	12
A. The Issue Is Not Properly Before This Court Because It Was Not Initially Raised In Or Considered At All By The Court Of Appeals On This Appeal	12
B. On The Merits, The Misalignment Defense Is Completely Consistent With The Decisions Of This Court And The Other Courts Of Appeals Interpreting The FSAA	13
IV. PETITIONER'S PURPORTED SEVENTH AMENDMENT CLAIM IS NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT	18

TABLE OF CONTENTS—Continued

Page

A. The Issue Is Not Properly Before This Court Because It Was Neither Initially Raised By Petitioner Nor Considered By The Court Of Appeals 18

B. There Is No Need For Review Of The Court Of Appeals' Fact-Specific Application Of This Court's Settled Principles Concerning When A Judgment Entered On A Jury's General Verdict Must Be Reversed 21

C. The Cases Cited By Petitioner Have Nothing To Do With This Case 23

CONCLUSION 24

TABLE OF AUTHORITIES

CASES Page

Adkins v. Ford Motor Co., 446 F.2d 1105 (6th Cir. 1971) 19
Affolder v. New York, Chicago & St. Louis R.R., 339 U.S. 96 (1950) 13-14
Albergo v. Reading Co., 372 F.2d 83 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967) 19
Atlantic City R.R. v. Parker, 242 U.S. 56 (1916) 14, 16
Avins v. White, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980) 19
Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) 12
Carden v. Westinghouse Electric Corp., 850 F.2d 996 (3d Cir. 1988) 19
City of Columbia v. Omni Outdoor Advertising, Inc., 111 S. Ct. 1344 (1991) 22
Dillinger v. Caterpillar, Inc., 959 F.2d 430 (3d Cir. 1992) 19
Gallick v. Baltimore & Ohio R. Co., 372 U.S. 108 (1963) 23
Geraghty v. Lehigh Valley R.R., 70 F.2d 300 (2d Cir. 1934) 16
Henry v. A/S Ocean, 512 F.2d 401 (2d Cir. 1975) 23
Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992) 22-23
Kern v. Levelor Lorentzen, Inc., 899 F.2d 772 (9th Cir. 1990) 19
Lewis v. Baker, 526 F.2d 470 (2d Cir. 1975) 7, 10, 11
Lind v. Schenley Industries, Inc., 278 F.2d 79 (3d Cir. 1960), *cert. denied*, 364 U.S. 835 (1960) 23
Maldonado v. Missouri Pacific Ry. Co., 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987) 15-16
Maryland v. Baldwin, 112 U.S. 490 (1884) 19, 21
Metcalfe v. Atchison, Topeka & Santa Fe Ry. Co., 491 F.2d 892 (10th Cir. 1974) 16
Miree v. DeKalb County, Georgia, 433 U.S. 25 (1977) 20
Montgomery v. Aetna Cas. & Sur. Co., 898 F.2d 1537 (11th Cir. 1990) 23

TABLE OF AUTHORITIES—Continued

Page

Morgan v. Consolidated Rail Corp., 509 F. Supp. 281 (S.D.N.Y. 1980) 23
Reed v. Philadelphia, Bethlehem & New England R.R. Co., 939 F.2d 128 (3d Cir. 1991) 4-5, 15
San Antonio & Arkansas Pass Ry. Co. v. Wagner, 241 U.S. 476 (1916) 16
Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 (1959) 23
Simko v. C & C Marine Maintenance Co., 594 F.2d 960 (3d Cir.), *cert. denied*, 444 U.S. 833 (1970) 19
Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19 (1962) 19, 22
Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987) 19
United New York and New Jersey Sandy Hook Pilots Association v. Halecki, 358 U.S. 613 (1959) 19, 22
United States v. Leo, 941 F.2d 181 (3d Cir. 1991) .. 23
UTU v. Lewis, 711 F.2d 233 (D.C. Cir. 1983) ...13, 14, 15, 16, 17
Wilmington Star Mining Co. v. Fulton, 205 U.S. 60 (1907) 19, 21-22
Yohannon v. Keene Corp., 924 F.2d 1255 (3d Cir. 1991) 18
Youngberg v. Romeo, 457 U.S. 307 (1982) 12

STATUTES AND RULES

Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.* 4
Federal Safety Appliance Act, 45 U.S.C. § 2 ..... *passim*
Fed. R. Evid. 401 11

OTHER AUTHORITIES

R. Stern, *Appellate Practice in the United States* (2d ed. 1989) 13
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 9
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1988 & Supp. 1991) .. 12

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BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT OF THE CASE

On the morning of May 7, 1986, petitioner was working as a freight conductor at the Iron Hill Central yard of respondent Philadelphia, Bethlehem & New England Railroad Company ("PBNE") in Bethlehem, Pennsylvania. PBNE is a short-line or switching railroad located within Bethlehem Steel Corporation's large steel plant in Bethlehem. On the morning of the accident, petitioner and the members of his crew were weighing railroad cars on the automatic "scale track."

Each individual car in a train is weighed by disconnecting or "cutting" it from the train on one side of the automatic scale and pushing or "dropping" it over the scale. The train's engine usually provides the push. After the initial push, each car drifts slowly over the scale to

the other side, where it reconnects with the car weighed before it. This process of disconnecting and reconnecting railroad cars naturally involves the automatic coupling mechanisms, required by the Federal Safety Appliance Act ("FSAA"), attached to each end of each car.[1]

The coupling mechanism that connects individual rail cars into trains is comprised of moving and fixed parts, each of which is designed for a specific purpose. The "drawbar" (or "drawhead") is the part of the coupling device that is attached to a freight car so that the coupler may move laterally. This pivoting movement provides the articulated joints between the cars in a train, and permits, for example, the train to negotiate the curve of the track. If drawbars were fixed and not capable of this side-to-side movement, trains could travel only in a straight line. The lateral movement of a drawbar is not a defect; it is essential to the normal, safe operation of a train.

At the end of the drawbar is a "knuckle." A pin attaches the knuckle to the drawbar. The knuckle is designed to be opened with a "cutting lever" which extends from the knuckle to the side of the car. In order to couple two freight cars together, at least one of the two knuckles must be open. If both knuckles are closed, then the connection cannot be made. It is not necessary for a worker to go between cars to open a knuckle. Knuckles are opened by means of the cutting lever, which may be done safely from outside the rails. Freight cars are designed so that their cutting levers are opposed, that is, one car's lever is on one side of the train while the other car's lever is on the opposite side.

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[1] Section 2 of the FSAA, 45 U.S.C. § 2, provides:

> It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The coupling mechanism can perform as intended only when the two drawbars are aligned properly with each other so that the couplers can join. If the drawbars are not properly aligned, they will bypass each other, and the cars will not couple.

As the crew conductor on the morning of May 7, 1986, petitioner controlled the weighing operation. Petitioner cut loose the first car to be weighed, a boxcar, from the train. He then climbed aboard the boxcar and rode it over and past the scale, applying the handbrake to stop the car on the flat straightaway several lengths beyond the scale. Petitioner dismounted the car, stood twenty feet to the north of the track on which the car was sitting, and signaled the crew to "drop" the second car, a scrap car, over the scale and down towards the boxcar. Watching as the scrap car approached the boxcar, petitioner saw that the drawbars were not aligned and that, consequently, the couplers would bypass each other. As a result, when the impact between the two cars occurred, they did not couple.

After waiting several minutes to be sure that the scrap car was standing still, petitioner walked over toward the two cars. He observed at once that the knuckles on both couplers had closed. Petitioner claimed that he decided for some reason to open the knuckles on both couplers. He first opened the knuckle of the coupler on the boxcar, using the cutting lever on the north side of the track.

Petitioner claimed that he then walked across the tracks to the south side, and claimed that he was unable to open the scrap car's knuckle by operating its lever.[2]

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[2] The evidence introduced at trial cast doubt on petitioner's version of the events. First, petitioner had no reason to open both knuckles for coupling to occur. Generally, only one knuckle has to be open, and the boxcar's knuckle opened without any problem. Moreover, the post-accident inspection showed that the scrap car's cutting lever was operable, despite the fact that it had a bent bracket.

According to the petitioner, he straddled the rail of the tracks and reached into the coupling mechanism to lift the pin by hand and manually open the knuckle. While reaching in that manner, petitioner asserts that he felt something against his right leg, "turned to swing [him]-self out" from between the cars and was injured when the second car rolled over his foot.

In 1987, petitioner brought suit against PBNE under two federal statutes, the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, and the FSAA, 45 U.S.C. § 2.

The first trial in this case was held in August 1990. Prior to the opening statements of counsel, petitioner withdrew his FELA claims grounded in negligence, and proceeded only under the FSAA, which imposes liability for injuries resulting from defective or malfunctioning equipment. Petitioner argued that the mere fact that the two railroad cars had failed to couple automatically on impact constituted a *per se* violation of the FSAA. PBNE denied that such a *per se* theory of liability existed, and defended on the grounds that the cars failed to couple for some reason other than a defect in the equipment, such as human error. The jury found in response to a special interrogatory that PBNE had not violated the FSAA.

On the first appeal of this case, the Court of Appeals reversed the judgment entered in favor of PBNE. *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991). During his closing argument in the District Court, petitioner's counsel had made what the Court of Appeals described as "emotional and mis-leading comments." 939 F.2d at 129. To counteract the prejudicial effect of those comments, the District Court permitted PBNE's counsel to tell the jury that petitioner was on disability, a matter which was not in the record because of the collateral source rule. The Court of Ap-peals found an abuse of discretion and remanded for a

new trial, stating: "Plaintiff's counsel's behavior warranted strong action by the trial court, but the proverbial two wrongs do not make a right." *Id.* at 134.

The second jury trial in this case took place in December 1991. As in the first trial, there was no dispute that the railroad cars initially failed to couple on impact, that petitioner went in between the cars, and that petitioner was injured. Therefore, the critical issue for the jury to decide was why the cars initially failed to couple on impact. If the failure to couple was caused by malfunctioning equipment, then the FSAA had been violated. However, if the failure to couple was caused, for example, by human error in the alignment of the drawbars, then the Act had not been violated.

PBNE presented compelling evidence in support of its human error theory of misalignment. Petitioner's fellow crew member, Robert Laudenslager, the individual responsible for aligning the drawbars, testified that he was not sure that he had aligned them properly. Petitioner himself admitted that as the scrap car approached the boxcar, prior to impact, he saw that the drawbars were not aligned. Finally, the post-accident inspection report, and the testimony of all three men who participated in the inspection, revealed that there was nothing wrong with the equipment concerning drawbar alignment.

After the District Court committed at least eleven, separate and distinct, serious trial errors, the second jury, unlike the first jury, found that PBNE had violated the FSAA. PBNE appealed, claiming that the District Court's eleven errors so unfairly prejudiced PBNE that a new trial was required. The Court of Appeals agreed with PBNE, and reversed and remanded for a new trial.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. This is a very fact-specific case, and the issues involved are unique to this litigation. The Court of Appeals' decision was not based on any overriding, contested

legal issue, but rather on the particular facts of this case and the case-specific trial errors committed by the District Court. Since this case turns on its own unique facts and circumstances, it does not have broad ramifications beyond this litigation, and it does not warrant review by this Court.

The errors committed by the District Court were all specific to the facts of this case, and included the following, *inter alia*: (1) ordering PBNE's counsel, in front of the jury, not to refer in his closing argument to crucial testimony in the record which powerfully supported PBNE's defense; (2) compounding that error by mistakenly telling the jury that this crucial testimony was not even "in evidence;" (3) erroneously instructing the jury that PBNE's evidence of the post-accident inspection of the railroad cars was "not relevant," thus again preventing the jury from considering extremely probative and persuasive evidence relevant to PBNE's defense; (4) improperly instructing the jury on Congress' supposed intent and purpose in enacting the FSAA, which of course was completely irrelevant to any issue to be decided by the jury; (5) doing so in a manner which may well have confused the jury into adopting petitioner's discredited *per se* theory of liability; (6) allowing petitioner's expert witness to testify, in a similarly misleading fashion, about Congress' supposed intent and purpose in enacting the FSAA; (7) allowing petitioner's expert witness to testify, incorrectly, and in the form of bald legal conclusions, that the failure of the cars to couple in this case was in itself a violation of the FSAA; (8) allowing petitioner's expert witness also to testify, improperly, that the alleged failure of the cutting lever to operate properly was also a violation of the FSAA; (9) compounding these errors by stating, in the presence of the jury, that petitioner's expert witness was "eminently qualified to opine on the Safety Appliance Act," and that "we will all benefit from his testimony;" (10) further compounding these errors by restricting PBNE's counsel's cross-

examination of petitioner's expert witness, thus preventing PBNE from exposing both the inaccuracy of his legal conclusions and the limits of his supposed "expertise;" and (11) allowing petitioner's counsel to capitalize on all of these errors by making improper arguments to the jury about Congress' supposed intent and purpose in enacting the FSAA and the *per se* theory of liability that had been explicitly rejected by the Court of Appeals.

On October 19, 1992, the Court of Appeals reversed and remanded for a new trial, not on the basis of any overarching legal question, but because it found that the "cumulative effect" of the errors committed by the District Court "was to deny a fair trial to the defendant." Pet. App. at 11a. The Court of Appeals' fact-specific ruling does not warrant review by this Court.

2. Moreover, none of the three issues which petitioner attempts to raise is a proper subject for review by this Court. With respect to the first issue, petitioner, in an attempt to manufacture a "conflict" where none actually exists, blatantly misrepresents what the Court of Appeals actually decided in this case. Neither the second issue nor the third issue is properly before this Court, because they were not initially raised in or considered at all by the Court of Appeals on this appeal.

a. Petitioner's first question presented blatantly misrepresents what the Court of Appeals actually decided in this case. Contrary to petitioner's statement, the Court of Appeals never found (and PBNE never argued) that the fact that the coupling mechanisms functioned properly immediately after the accident constituted a "defense" to petitioner's claim that the mechanisms failed to work at the time of the accident. Instead, the Court of Appeals, following *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975), merely held, contrary to the District Court's jury instruction, that *in this case*, the results of the post-accident inspection were *relevant evidence* from which the jury should have been permitted to infer that there was

nothing mechanically wrong with the coupling mechanisms at the time of the accident. The Court of Appeals' decision accords with common sense, and with the broad definition of "relevancy" in the federal courts. The Court of Appeals' "relevancy" decision is unique to this case and therefore, not surprisingly, does not conflict with the decisions of this Court or any other court of appeals. There is clearly no need for this Court to review this extremely limited evidentiary question.

b. Petitioner's second question presented—whether drawbar misalignment constitutes a valid affirmative defense to a claimed violation of the FSAA—is not properly before this Court, because the issue was not initially raised in or considered at all by the Court of Appeals on this appeal. In any event, even if considered on the merits, it is clear that the misalignment defense is fully in accord with this Court's decisions interpreting the FSAA, and does not conflict with the decision of any other court of appeals.

c. Petitioner's purported Seventh Amendment claim is also not properly before this Court, because it was also not initially raised in or considered at all by the court below. Moreover, even if it were properly before this Court, petitioner's Seventh Amendment claim would be frivolous. The Court of Appeals in this case merely applied well-settled precedents from this Court which establish that when a jury's general verdict does not distinguish between two theories of liability, and a finding on one theory would have been tainted with prejudicial error, reversal is required because it is impossible to determine whether the prejudicial error was responsible for the jury's verdict. In addition, contrary to petitioner's assertions, *both* of his theories of liability were tainted by prejudicial error. Under these circumstances, the Court of Appeals had no choice but to reverse and remand for a new trial, and this case does not implicate any "Seventh Amendment" concerns whatsoever. Finally,

the cases cited by petitioner involve completely different legal and factual issues that have nothing to do with this case.

In fact, nothing about this case warrants the extraordinary assertion of jurisdiction by this Court. This is a very fact-specific case, without any overriding, unsettled legal issues. The Court of Appeals' decision does not conflict in any way with the decisions of this Court, or with the decisions of any other court of appeals. The Court of Appeals merely applied well-settled law to the particular facts of this case, and there is simply no reason for this Court to hear this case.

REASONS FOR DENYING THE WRIT

I. THIS IS A UNIQUE, FACT-SPECIFIC CASE THAT DOES NOT WARRANT REVIEW BY THIS COURT.

This is a unique, fact-specific case. The Court of Appeals' decision was not based on any overarching legal principles, but rather on its analysis of the particular facts of this case and its finding that the District Court had committed a series of separate and distinct trial errors whose cumulative effect was to deny a fair trial to PBNE. Since this case turns on its own unique facts and circumstances, it does not have broad ramifications beyond this litigation, and it does not warrant review by this Court. *See* R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 221 (6th ed. 1986).

II. THERE IS NO NEED FOR REVIEW OF THE COURT OF APPEALS' DETERMINATION THAT EVIDENCE OF THE POST-ACCIDENT INSPECTION WAS "RELEVANT" IN THIS CASE.

Petitioner claims as part of his first question presented that the Court of Appeals held that "evidence that a safety appliance functioned after the injury was a *defense* to petitioner's claim that it was inoperative at the

time of his injury." Pet. at i (emphasis added). However, as petitioner is well aware, this statement grossly misrepresents what the Court of Appeals actually decided.

The Court of Appeals never decided (and PBNE never argued) that PBNE's evidence of the post-accident inspection constituted a *defense* to petitioner's claims. Instead, the Court of Appeals merely held that the fact that the coupling mechanisms functioned properly immediately after the accident was *relevant evidence* from which the jury should have been permitted to infer that the coupling mechanisms would have functioned properly just minutes before, if they had been properly aligned:

> Another prejudicial comment by the court on the misalignment defense occurred during the instruction to the jury. During the trial, the railroad introduced evidence showing that the coupler functioned properly when tested in the investigation shortly after the accident occurred. In his charge, the district judge said, "it is not relevant whether the coupler mechanism functioned properly before or after the accident in question."
>
> That instruction was correct insofar as it would apply to the plaintiff's prime [sic] facie case. The evidence that the coupling equipment was functioning properly immediately after the accident, however, was clearly relevant to the railroad's misalignment defense. *Lewis v. Baker*, 526 F.2d 470, 474 (2d Cir. 1975) (condition of brake on railroad car after accident was relevant). Evidence of proper operation immediately after the accident tended to show that Laudenslager's more general observations about misalignment had particular application to this incident. In that context. the statement by the district court about the post-inspection report was not harmless.

Pet. App. at 7a.

The Court of Appeals' decision was clearly correct. While evidence of post-accident performance may not be *dispositive* of whether the coupling mechanisms func-

tioned properly at the time of the accident, it is certainly *relevant* to the question of how the couplers performed only minutes before. The jury should have been permitted to infer from this evidence that the railroad cars failed to couple because, as PBNE maintained, the drawbars were misaligned, and not because of any equipment failure.

The Court of Appeals' decision was directly supported by *Lewis v. Baker*, 526 F.2d 470 (2d Cir. 1975), which was also a case brought pursuant to the FSAA. The plaintiff in *Lewis* alleged that he had been injured due to a defective handbrake. The United States Court of Appeals for the Second Circuit held that the District Court in that case had properly instructed the jury that it could infer, based upon evidence that the brake functioned properly both immediately before and immediately after the accident, that the brake also functioned properly at the time of the accident:

> When the state of an object at a particular time is in issue, we have repeatedly upheld the relevancy of evidence of that object's condition before and after the time in question. . . .
>
> While the weight to be given evidence of prior and subsequent condition differs in each case and is of course a question for the trier of fact, it was proper for the trial judge to tell the jury that they might conclude or presume from that evidence a proper functioning during the interim.

Id. at 474-75 (citations omitted).[3]

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[3] Under Rule 401 of the Federal Rules of Evidence, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Obviously, the evidence introduced at trial, which showed that the coupling mechanisms functioned properly immediately after the accident, had some tendency to prove that the coupling mechanisms would have functioned properly just minutes before if they had been

Petitioner does not and cannot point to *any* decision from *any* court which conflicts with this case-specific relevance ruling by the Court of Appeals. Realizing this dilemma, petitioner has attempted to manufacture a conflict by falsely claiming that the Court of Appeals held that evidence of the post-accident inspection constituted a "defense" to petitioner's claims. The Court of Appeals never held any such thing, and there is no conflict in need of resolution by this Court.

III. THIS COURT SHOULD NOT GRANT REVIEW TO CONSIDER THE VALIDITY OF THE MISALIGNMENT DEFENSE.

A. The Issue Is Not Properly Before This Court Because It Was Not Initially Raised In Or Considered At All By The Court Of Appeals On This Appeal.

Petitioner argues to this Court that no misalignment defense exists under the FSAA. Petitioner, however, failed to raise this issue properly in the Court of Appeals. As a result, the Court of Appeals did not address the validity of the misalignment defense in its opinion below.

Under these circumstances, the misalignment defense issue is not properly before this Court. This Court looks for a fully developed record, including the guidance of the court of appeals, on all issues that it addresses. *See, e.g., Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 277 n.23 (1989); *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982). *See also* 17 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4036, at 38-39 (2d ed. 1988 & Supp. 1991) (Court reluctant to consider an issue not addressed by the court of appeals, even if properly raised, because it would lose "the advantage of prior appellate scrutiny of the record and deliberation of the arguments"). Because the

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properly aligned. In any event, there is no question about the relevancy of this particular piece of evidence which warrants the extraordinary assertion of jurisdiction by this Court.

Court of Appeals did not consider the misalignment defense issue on this appeal, this issue is not a proper subject for review by this Court.[4]

B. On The Merits, The Misalignment Defense Is Completely Consistent With The Decisions Of This Court And The Other Courts Of Appeals Interpreting The FSAA.

Even if petitioner had properly raised the misalignment defense issue on the second appeal, this issue would still not warrant review by this Court. Contrary to petitioner's argument, the Court of Appeals' decision on the first appeal of this case confirming the existence of the misalignment defense is not in conflict with the decisions of either this Court or any other court of appeals.

In fact, the Court of Appeals' decision is entirely consistent with and directly supported by this Court's decisions interpreting the FSAA. It has long been recognized that the FSAA is an equipment-oriented statute, and does not impose liability for injuries caused by, for example, human error.[5] In *Affolder v. New York, Chicago & St.*

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[4] On the first appeal of this case, in 1991, the Court of Appeals upheld the validity of the misalignment defense. On the second appeal, petitioner was, of course, entitled to urge any ground in support of the judgment in his favor, including the argument that no misalignment defense exists under the FSAA. R. Stern, *Appellate Practice in the United States* 124 (2d ed. 1989). Petitioner, however, failed to raise that issue in his brief to or in oral argument before the Court of Appeals. Instead, petitioner waited until his petition for rehearing en banc before raising the issue on this appeal. Since the Court of Appeals denied the petition for rehearing without opinion, the Court of Appeals never considered the misalignment defense issue on this appeal. Petitioner's failure to raise this issue on the second appeal makes the misalignment defense an improper subject for review in this case, because this Court has been denied the benefit of a more recent exposition of the issue by the Court of Appeals.

[5] *See, e.g., UTU v. Lewis*, 711 F.2d 233, 244-45, 251 (D.C. Cir. 1983) ("[t]he predicate for liability under section 2 is the failure

Louis R.R., 339 U.S. 96 (1950), this Court held that there can be a violation of the FSAA only "assum[ing] that the coupler was placed in a position to operate on impact." *Id.* at 99.[6] Thus, if " 'the failure of . . . two cars to couple on impact was because the coupler on [one of the cars] had not been properly opened,' the railroad [would have] a good defense." *Id.*[7] Justice Jackson, who dissented on the ground that the charge in *Affolder* was confusing, nevertheless agreed with the majority on the correct legal standard: "Before a failure to couple establishes a defective coupler, it must be found that it was *properly set* so it could couple. If it was not adjusted, as such automatic couplers must be, of course, *the failure is not that of the device.*" 339 U.S. at 101 (Jackson, J., dissenting) (emphasis added).

Just as automatic couplers cannot work properly unless at least one knuckle is open, they cannot work properly if the drawbars are not aligned. Indeed, the possibility that an automatic coupling would not occur because of a misaligned but non-defective drawbar was recognized even before *Affolder* considered the situation of a failure to couple because of a closed knuckle. In *Atlantic City R. R. v. Parker*, 242 U.S. 56, 59 (1916), Justice Holmes noted that "[s]ome lateral play must be allowed to drawheads," and that if a railroad car is on a curve, that "would tend to throw the coupler out of line." [8]

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to provide equipment that functions as the statute demands," and the FSAA "does not address operating procedures.").

[6] The question presented to the jury in *Affolder*, which this Court approved, was "whether, *after the couplers were placed in open or proper position*, they failed to couple automatically on impact." 339 U.S. at 99 (emphasis added).

[7] Accordingly, the railroad in *Affolder* argued to the jury that the knuckle was closed because the switchman failed to open it, rather than because of any equipment failure. The court allowed the jury to consider this defense. 339 U.S. at 99-100 & n.4.

[8] As the Court of Appeals for the D.C. Circuit explained in *UTU v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), drawbars are not designed

On the first appeal of this case, the Court of Appeals relied on these precedents from this Court in upholding PBNE's misalignment defense:

> We think the rationale of *Affolder*, which allows a defense of closed knuckles, applies equally to a situation where nondefective equipment is misaligned. In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act.

939 F.2d at 132.

The Court of Appeals' decision is also consistent with the decisions of other courts of appeals interpreting the FSAA. In *Maldonado v. Missouri Pacific Ry. Co.*, 798 F.2d 764, 768 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), the Court of Appeals for the Fifth Circuit examined the FSAA and its legislative history and concluded that "drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the noncoupling does not reflect defective or failed equipment." 798 F.2d at 768. The *Maldonado* court also stated that, to be entitled to a charge on a misalignment defense, a railroad must "produce evidence tending to show that the misalignment was *not* due to equipment failure or defect." *Id.* at 768 (emphasis in original).[9] *See also UTU v. Lewis*, 711 F.2d 233, 244-45,

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to remain in a perfectly straight and centered position. On the contrary, they must be and are designed to move off center position. Drawbars that slide and move provide slack and flexibility between cars, and thereby avoid derailments as cars go around curves. The fact "that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is defective." *See* 711 F.2d at 235 n.5.

[9] The *Maldonado* court did not actually hold that the railroad in that case could raise a defense of misalignment, however, because

251 (D.C. Cir. 1983) ("[t]he predicate for liability under section 2 is the failure to provide equipment that functions as the statute demands," and the FSAA "does not address operating procedures.").

The cases cited by petitioner do not support his *per se* theory of liability. In both *San Antonio & Arkansas Pass Ry. Co. v. Wagner*, 241 U.S. 476, 483-84 (1916) and *Atlantic City R.R. v. Parker*, 242 U.S. 56, 59 (1916), there was evidence that the misalignment in those cases was caused by equipment defect or failure. In *Wagner*, there was affirmative evidence of defective equipment: a knuckle pin failed to drop upon impact, resulting in a misaligned drawbar. 241 U.S. at 479. The *Parker* opinion suggests that there was no credible explanation for the misalignment in that case other than equipment failure or defect. *See* 242 U.S. at 59. These decisions do not conflict with the decisions upholding the misalignment defense, and do not provide any support for the petitioner's *per se* theory of liability.[10]

Petitioner's next claim, that PBNE "did not produce an iota of evidence" (Pet. at 10) that the misalignment in this case was not due to equipment defect or failure, is also without merit. The evidence in this case was more than sufficient for a jury reasonably to infer that the cause of the failure to couple was a misaligned drawbar,

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the railroad "did not produce any evidence that would sustain an instruction on such a defense." 798 F.2d at 769.

[10] The other federal decisions cited by petitioner also do not support his argument, notwithstanding the broad dicta in some of them. Like *Wagner* and *Parker*, these cases imply that the juries could have reasonably found that the misalignments were caused by equipment failure, based either on affirmative evidence of such failure, *e.g.*, *Geraghty v. Lehigh Valley R.R.*, 70 F.2d 300, 303 (2d Cir. 1934) (worn-out components of coupling apparatus), or on the lack of an explanation for the misalignment other than equipment failure. *E.g.*, *Metcalfe v. Atchison, Topeka & Santa Fe Ry. Co.*, 491 F.2d 892, 897 (10th Cir. 1974) (drawbar extremely out of line).

and that the misalignment was not due to equipment failure or defect. Petitioner himself testified that as he watched the scrap car approach the boxcar prior to impact, he could see that the drawbars were not aligned. The scrap car had just left petitioner's fellow crew member, Mr. Laudenslager, traveling over the scale down toward the boxcar.[11] Mr. Laudenslager testified on direct examination that he had aligned the drawbar before he sent the scrap car over the scale, but admitted on cross-examination that he was not sure if he aligned it properly. Furthermore, PBNE introduced evidence which demonstrated that the couplers were not defective and were functioning properly immediately after the accident. There was no evidence in the post-accident inspection report or anywhere else which indicated that there was any defect or problem in the equipment concerning drawbar alignment.

This evidence was clearly sufficient to permit an inference that the failure to couple occurred either because Mr. Laudenslager did not align the drawbar properly, or because the drawbar moved out of alignment as the scrap car rolled over the scale. *See UTU v. Lewis*, 711 F.2d at 235; note 11, *supra*. Accordingly, petitioner's claim that PBNE did not produce any evidence to support its misalignment defense is patently untrue.

PBNE's misalignment defense was supported by the decisions of this Court, the decisions of the courts of appeals, and the particular facts of this case. There is no

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[11] Jarring caused by movement of railroad cars over the tracks alone may prevent cars equipped with fully operating and functioning automatic couplers from coupling on impact. For example, "[t]he vibration of an uncoupled car as it descends into the bowl, or the jarring that occurs when the cars meet, may cause the knuckles of the couplers to close *or the drawbar to move out of alignment for coupling.*" *UTU v. Lewis*, 711 F.2d at 235 (emphasis added.) In his testimony at trial, Mr. Laudenslager confirmed that drawbars will move just through the normal movement of railroad cars over the tracks.

conflict in need of resolution by this Court, and this issue is not a proper subject of review by this Court.

IV. PETITIONER'S PURPORTED SEVENTH AMENDMENT CLAIM IS NOT A PROPER SUBJECT FOR REVIEW BY THIS COURT.

A. The Issue Is Not Properly Before This Court Because It Was Neither Initially Raised By Petitioner Nor Considered By The Court Of Appeals.

Petitioner's purported Seventh Amendment claim, like the misalignment defense issue, is not properly before this Court because it was not initially raised in or considered at all by the Court of Appeals.

At trial, petitioner advanced two separate and distinct theories in support of his claim that PBNE violated Section 2 of the Federal Safety Appliance Act: (1) the failure of the railroad cars to couple automatically on impact; and (2) the supposed failure, after the impact, of the cutting lever to open the knuckle of the scrap car's coupler. PBNE vigorously disputed each of petitioner's claims, and presented compelling evidence in defense of both of these theories of liability.[12] PBNE's misalignment defense was an affirmative defense to the

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[12] The record reflects substantial disputed evidence about both theories. There was powerful evidence in the record supporting PBNE's misalignment defense, which was an affirmative defense to petitioner's "failure to couple" theory of liability. There was also powerful evidence that the cutting lever was operating properly at the time of the accident, and that, in any event, the cutting lever could not have caused petitioner's injury because petitioner was never in a position to have attempted to use the cutting lever.

Apparently recognizing that both of his liability theories were disputed in the record, petitioner never moved for a directed verdict on either theory. Petitioner's failure to move for a directed verdict precludes him from now arguing that the evidence supporting either of his theories of liability was undisputed. *See Yohannon v. Keene Corp.*, 924 F.2d 1255, 1261-63 (3d Cir. 1991) (by failing to move for a directed verdict, a party waives the right to make arguments about the sufficiency of the evidence).

appellee's "failure to couple" theory of liability, but not to the appellee's "cutting lever" theory of liability.

At oral argument, counsel for the petitioner suggested for the first time that, because he presented evidence on the "cutting lever" theory of liability to the jury, the Court of Appeals should affirm the judgment entered in the District Court *even if* it found that the District Court committed prejudicial error which eviscerated PBNE's misalignment defense.[13] Because petitioner had failed to raise this issue before oral argument, the panel requested additional briefing. The parties' post-argument briefs and the cases cited therein *did not even mention* the words "Seventh Amendment," much less raise the issue which petitioner is now trying to raise in this Court. Instead, in its post-argument brief, PBNE demonstrated that a long line of precedent from this Court and the Court of Appeals for the Third Circuit[14] establishes that, when a jury's general verdict does not distinguish between two theories of liability, and a finding on one theory would have been tainted by prejudicial error, reversal is required because it is impossible to determine whether or not the

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[13] At oral argument, petitioner's counsel referred to three court of appeals cases which supposedly supported his argument: *Kern v. Levelor Lorentzen, Inc.*, 899 F.2d 772 (9th Cir. 1990); *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); and *Adkins v. Ford Motor Co.*, 446 F.2d 1105 (6th Cir. 1971). None of these cases dealt with the Seventh Amendment.

[14] *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962); *United New York and New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613, 619 (1959); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79 (1907); *Maryland v. Baldwin*, 112 U.S. 490, 493 (1884); *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 432 n.2 (3d Cir. 1992); *Carden v. Westinghouse Electric Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988); *Avins v. White*, 627 F.2d 637 (3d Cir.), *cert. denied*, 449 U.S. 982 (1980); *Simko v. C & C Marine Maintenance Co.*, 594 F.2d 960, 967 (3d Cir.), *cert. denied*, 444 U.S. 833 (1970); *Albergo v. Reading Co.*, 372 F.2d 83, 86 (3d Cir. 1966), *cert. denied*, 386 U.S. 983 (1967).

error was responsible for the jury's verdict. PBNE also demonstrated that the cases cited by petitioner's counsel were either inapposite or directly in violation of this Court's precedents and that, in any event, reversal was required even under the rationale of those cases.

The Court of Appeals properly followed the controlling precedents of this Court, and held that reversal was required because it was impossible to determine whether or not the series of errors committed by the District Court was responsible for the jury's verdict.

After the Court of Appeals reached its decision, petitioner abandoned the cases and arguments discussed at oral argument and in the post-argument briefs, and concocted a totally new theory. In his petition for rehearing en banc to the Court of Appeals, petitioner for the very first time claimed that the Seventh Amendment required the Court of Appeals to "reconcile" and affirm the jury's verdict. Since the Court of Appeals denied the petition for rehearing en banc without opinion, the Court of Appeals *never* addressed the Seventh Amendment issue which petitioner is now trying to raise in this Court.

Under these circumstances, it is clear that petitioner's purported Seventh Amendment claim is not properly before this Court. As discussed above, this Court looks for a fully developed record, including the guidance of the court of appeals, on all issues that it addresses. *See* Section III.A., *supra*. Petitioner's Seventh Amendment issue has not been addressed by either court below at any stage of this case, and petitioner's attempt to have this Court decide the issue in the first instance is improper. Petitioner's argument "is so obviously an afterthought" as not to warrant any consideration by this Court. *See Miree v. DeKalb County, Georgia*, 433 U.S. 25, 33-34 (1977).

B. There Is No Need For Review Of The Court Of Appeals' Fact-Specific Application Of This Court's Settled Principles Concerning When A Judgment Entered On A Jury's General Verdict Must Be Reversed.

The petitioner's purported Seventh Amendment claim is also not a proper subject for review by this Court because the Court of Appeals' decision merely applied this Court's settled precedents to the particular facts of this case. This Court has repeatedly made it clear that, when a jury returns a general verdict which may have been based on either of two theories, and a finding on one theory would have been tainted with prejudicial error, the reviewing court must reverse because it is impossible to determine whether or not the error was responsible for the jury's verdict. This rule comports with fairness and common sense, and does not implicate any Seventh Amendment concerns whatsoever.

In *Maryland v. Baldwin*, 112 U.S. 490 (1884), this Court set forth the principle that required reversal in this case:

> On the trial evidence was introduced bearing upon all the issues, and if any one of the pleas was, in the opinion of the jury, sustained, their verdict was properly rendered, but *its generality prevents us from perceiving upon which plea they found. If, therefore, upon any one issue error was committed, either in the admission of evidence, or in the charge of the court, the verdict cannot be upheld,* for it may be that by that evidence the jury were controlled under the instructions given.

112 U.S. at 493 (emphasis added). This Court has, on four separate occasions, reaffirmed the principle that a judgment based on a general verdict must be reversed where the verdict may have been based on a theory of liability which was tainted with prejudicial error. *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78-79

(1907) (finding it "impossible to say that prejudicial error did not result" where the jury was "wrongfully permitted over the objection of the opposing party to take into consideration in reaching a verdict counts of a declaration which have not been supported by any evidence, and where it is impossible from the record to say upon which of the counts of the declaration the verdict was based . . . ."); *United New York and New Jersey Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613, 619 (1959) ("a new trial will be required, for there is no way to know that the invalid claim . . . was not the sole basis for the verdict."); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U.S. 19, 29-30 (1962) (quoting language from *Maryland v. Baldwin* set forth above); *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1356 (1991) (a "jury's general verdict . . . cannot be permitted to stand" where it may have been based on instructions that allowed the jury to find liability on an improper ground). These precedents from this Court mandate reversal of a jury's general verdict which may have been based on a tainted theory of liability, *even if* there was another theory of liability that was not tainted by any error.

Reversal was even more clearly required in this case since, contrary to petitioner's statements, *both* of his theories of liability were tainted with prejudicial error. For example, the District Court erroneously allowed petitioner's expert witness to testify that the supposed failure of the cutting lever on the scrap car to operate was a violation of the FSAA, and that he had "no doubt" that PBNE's "violations" of the FSAA caused petitioner's injury.[15] Moreover, the District Court's improper instruc-

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[15] This testimony was clearly improper, because an expert witness is not permitted to testify in the form of bald legal conclusions, or to usurp the trial judge's duty of instructing the jury on the law. *See, e.g., Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir. 1992) ("an expert . . . is not qualified to compete with the judge in the function

tions and petitioner's counsel's improper arguments may have misled the jury into basing its verdict on Congress' supposed intent and purpose in enacting the FSAA, rather than on *either* of petitioner's theories of liability. Since both of petitioner's theories were tainted by prejudicial error, the Court of Appeals had no choice but to reverse and remand for a new trial.

C. The Cases Cited By Petitioner Have Nothing To Do With This Case.

Petitioner does not even discuss, much less attempt to distinguish, the long line of precedents from this Court which mandated the Court of Appeals' decision. Instead, petitioner cites only cases involving completely different factual and legal issues.

In fact, none of the cases cited by petitioner involves the situation here, the review of a judgment entered on a jury's general verdict which did not distinguish between different theories of liability. Instead, these cases involve totally inapposite issues, such as a district court's discretion to grant a new trial when it finds that a jury's verdict is against the weight of the evidence,[16] and a court's duty to determine whether a jury's answers to special interrogatories are inconsistent and, if so, to attempt to reconcile them.[17] These issues have nothing

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of instructing the jury."); *United States v. Leo*, 941 F.2d 181, 196 (3d Cir. 1991) ("it is not permissible for a witness to testify as to the governing law since it is the district court's duty to explain the law to the jury"); *Montgomery v. Aetna Cas. & Sur. Co.*, 898 F.2d 1537, 1541 (11th Cir. 1990) ("A witness also may not testify to the legal implications of conduct; the court must be the jury's only source of law.").

[16] *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 110 (1959); *Lind v. Schenley Industries, Inc.*, 278 F.2d 79, 90 (3d Cir. 1960) (en banc), *cert. denied*, 364 U.S. 835 (1960).

[17] *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 119 (1963); *Henry v. A/S Ocean*, 512 F.2d 401, 403-04 (2d Cir. 1975); *Morgan v. Consolidated Rail Corp.*, 509 F. Supp. 281, 284 (S.D.N.Y. 1980).

whatsoever to do with this case, and it is therefore obvious that this is not a proper case in which to review the Seventh Amendment issues which petitioner claims arise from those cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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